STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

THE VILLAGE OF LINCOLN, a Michigan municipal corporation,

Plaintiff/Appellee,

v.

VIKING ENERGY OF LINCOLN, INC.,

Defendant/Appellant.

Supreme Court Case No.: ***127144***
Court of Appeals Case No.: ***246319***
Circuit Court No.: ***00-10619 CE(K)***

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VIKING ENERGY OF LINCOLN, INC.'S, REPLY TO THE VILLAGE OF LINCOLN'S RESPONSE IN OPPOSITION TO VIKING'S APPLICATION FOR LEAVE TO APPEAL

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I. INTRODUCTION

Viking Energy of Lincoln, Inc. ("Viking") files this brief in reply to the Village of Lincoln's Response in Opposition. The case centers on the Village's efforts to enforce its Ordinance 96-2. Viking agrees with the Court of Appeals' holding that Section 6 of Ordinance 96-2 is unconstitutional. Viking submits, however, that the remainder of the ordinance is also invalid on procedural grounds and that the Court of Appeals' rejection of Viking's position was error and in conflict with decisions of this Court.

II. STANDARD OF REVIEW

The Village is correct in its statement that the standard of review for this matter is "de novo" – not only for the Court of Appeals' review of the Circuit Court's decision, but also for the Supreme Court as it considers the Court of Appeals' decision in the matter at hand. Veenstra v Washtenaw Country Club, 466 Mich 155,159; 645 NW2d 643 (2002).

III. ARGUMENT

A. The Supreme Court should grant Viking's Application for Leave to Appeal on the grounds of MCR 7.302(B)(2) because this case was brought by a subdivision of the state and raises an issue of significant public interest.

The Village argues that MCR 7.302(B)(2)[1] provides no grounds for this Court to grant Viking's Application for Leave to Appeal. The Village is mistaken. MCR 7.302(B)(2) states that one of the grounds for granting Leave to Appeal is that "the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions." The Village, as a municipal corporation in the State of Michigan, is a subdivision of the State. The

[1] In describing the grounds for granting leave to appeal, page 2 of Viking's Application inadvertently cited to MCR 7.302(B)(1) rather than MCR 7.302(B)(2). The associated discussion on page 2 of the Application for Leave to Appeal obviously addressed the grounds listed in MCR 7.302(B)(2) and the Village's Response in Opposition demonstrates that it was not misled.

case raises the issue of whether a locality should be allowed to enforce an invalid ordinance, an issue of significant public interest.

The State has set strict procedures for adopting ordinances and other laws. These procedures are designed to protect the public interest. When a locality flagrantly disregards procedural requirements, is notified of those procedural irregularities multiple times prior to the attempted adoption of an ordinance, and still takes no steps to correct the procedural problems, but forges ahead to adopt and enforce the flawed ordinance, there is a significant public interest in preventing it from doing so. Otherwise, the public has no remedy to protect it from the locality's violation of applicable requirements in adopting ordinances. As such, this case falls squarely within the grounds of MCR 7.302(B)(2).

B. The Supreme Court should grant Viking's Application for Leave to Appeal on the grounds of MCR 7.302(B)(5) because the Court of Appeals' decision to invalidate only Section 6 of Ordinance 96-2 was clearly erroneous, will cause material injustice, and conflicts with existing Supreme Court decisions.

The Village states that Viking's Application for Leave to Appeal should not be granted based on MCR 7.302(B)(5). The Village is wrong.

MCR 7.302(B)(5) allows this Court to grant Leave to Appeal from a Court of Appeals' decision where that decision "is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals." While the Court of Appeals' decision to invalidate Section 6 of Ordinance 96-2 on constitutional grounds is sound, the Court of Appeals clearly erred in holding that Viking is barred from attacking the remainder of Ordinance 96-2 on procedural grounds.

The Court of Appeals ignored uncontradicted evidence that Viking did not acquiesce in the process used to adopt Ordinance 96-2. Viking sent notices to the Village throughout the flawed ordinance adoption process identifying the problems with the proposed process and the

mistakes made in attempting to adopt the ordinance. (Appl. Leave to Appeal, Addenda 23, 28 & 29). The Village ignored all of these warnings.

It was not until three years later, when Viking had applied for and obtained a new permit in July 2000 from the Michigan Department of Environmental Quality ("MDEQ") to burn a different mix of fuels and began burning the new permitted mix of fuels, that the Village first threatened Viking with enforcement of the ordinance. Several months later, the Village brought its initial action against Viking to enforce Ordinance 96-2.

The Court of Appeals' holding will cause material injustice, not just to Viking, but to other similarly situated parties. The holding below allows a local government to proceed with the enforcement of an invalidly adopted ordinance, ignoring State and local law in the process. Under the Court of Appeals' reasoning, invalidly adopted ordinances are considered valid unless they are challenged within a short time of the attempted adoption. Under the ruling below, there is no recourse for parties to whom the invalidly adopted ordinance first applies at some future time. Indeed, under the Court of Appeals' ruling, there is an absolute barrier to challenging an invalidly adopted ordinance even though none of the elements of estoppel is present. This Court's decisions in Castle Investment Co v City of Detroit, 471 Mich 904; 688 NW2d 77 (2004), and Schaefer v City of East Detroit, 360 Mich 536; 104 NW2d 390 (1960), set out the applicable law and the Court of Appeals' decision conflicts with that controlling precedent.

C. The Village's failure to follow State and local law in its attempt to adopt Ordinance 96-2 has resulted in a completely invalid ordinance.

While the Village may consider procedures to be superfluous and of little importance, they are critical for the valid adoption of laws in this State. The law is clear that a zoning ordinance is void if the municipality fails to follow strictly the relevant enactment procedures. Krajenke Buick Sales v Hamtramck City Eng'r, 322 Mich 250, 255; 33 NW2d 781 (1948).

Villages, such as Lincoln, must adhere to the procedure provided under the City and Villages Zoning Enabling Act, MCL 125.581, et seq. City of Ann Arbor v Danish News Co, 139 Mich App 218, 224; 361 NW2d 772 (1984), appeal denied, 424 Mich 863 (1985). A zoning ordinance, which is enacted without following the mandatory provisions of the Zoning Enabling Act, is void and unenforceable. Id. Without compliance with such provisions, there is no way to assure that the public will have notice and opportunity for comment.

The Village's Response in Opposition provides a chart of State law requirements and Village responses to those requirements, but the chart is incomplete and misleading. [2]

First, and most importantly, MCL 125.584(5) (1997) requires a 2/3 vote of the *entire legislative body*, in this case the Village Council, to approve an ordinance that is subject to a protest petition. Viking filed a protest petition concerning Ordinance 96-2 on December 31, 1996 (Appl. Leave to Appeal, Addendum 22). The Village Council consisted of seven people, all seven of whom were in attendance at the February 3, 1997, meeting when the Village Council voted to adopt Ordinance 96-2. At the time, the Village had an informal policy that the president only voted in the case of a tie vote. This policy, however, cannot shield the Village from having to comply with specific State law concerning the adoption of ordinances subject to a protest petition – as was the case for Ordinance 96-2. Four out of seven members of the Village Council voted in favor of adopting Ordinance 96-2; the president was present at the meeting but did not vote. While the Village describes the Village Council's vote as 4 out of 6 votes, it is clear that the Village seeks to side step compliance with the law. The vote was actually 4 out of 7 eligible

[2] There are numerous statements of opinion and unsupported misstatements in the Village's purported statement of facts in its Response in Opposition. Viking is responding in the body of its argument to specific points and will not respond point-by-point to correct the Village's statements. Viking relies on the record – which speaks for itself.

voters, a vote that does not meet the 2/3 approval requirement of MCL 125.584(5). Therefore, Ordinance 96-2 is invalid as it was not adopted by the mandated super-majority vote.

Second, MCL 125.584(1) requires notice of the date and time of a public hearing before the *Planning Commission*. The Village provided notice of a public hearing, but the hearing was advertised to be held before the *Village Council*, not the Planning Commission. The Planning Commission, not the Council, ultimately held the hearing on the advertised date, but there was no change in the public notice for this meeting.

Third, and entirely missing from the Village's chart in its Response in Opposition, the Village's own Zoning Ordinance required the Village Council, not just the Planning Commission, to hold an advertised public hearing. Zoning Ordinance § 7.3.2 (Appl. Leave to Appeal, Addendum 10). The Village Council held no such noticed public hearing.

The Village's behavior in adopting Ordinance 96-2 was egregious, particularly where the Village was informed at each step about its mistakes. In fact, if it desired to enforce the Ordinance on a future date, there is no reason why the Village could not have corrected its mistakes, and adopted a procedurally valid ordinance within a short time after the initial adoption attempt in February 1997. But the Village did not choose to correct its procedural mistakes, and the result is that Ordinance 96-2 is invalid.

D. Neither public policy concerns nor the passing of time precludes Viking from challenging the validity of Ordinance 96-2.

The Court of Appeals' ruling directly conflicts with this Court's decisions in Castle Investment Co v City of Detroit, 471 Mich 904; 688 NW2d 77 (2004), and Schaefer v City of East Detroit, 360 Mich 536; 104 NW2d 390 (1960). The Court in these cases allowed the challenge to improperly enacted ordinances where time had passed but there had been no reliance on the flawed ordinances.

As discussed in Section C above, the general rule is that an improperly enacted ordinance is void. There is, however, a fact-specific exception to the general rule that precludes challenges to an improperly enacted ordinance where time has passed and there has been reliance on the flawed ordinance. Edel v Filer Twp, 49 Mich App 210, 213, 214; 211 NW2d 547 (1973). This exception, which is based on public policy concerns, *does not* apply in the case at bar.

The Court of Appeals first articulated the "public policy" exception in Northville Area Non-Profit Housing Corp v City of Walled Lake, 43 Mich App 424; 204 NW2d 274 (1972), leave to appeal denied, 389 Mich 768 (1973). In that case, which has no similarity to the facts in Viking's case, the City argued that its own zoning amendment was invalid because the City Clerk allegedly failed to publish notice of the hearing on a proposed zoning amendment.

The Northville court rejected the City's argument for several reasons. First, the court found that the City had the burden of proving, but in fact never established, that the Clerk had failed to publish notice of the hearing. Second, the Plaintiff developer had relied to its detriment on the ordinance amendment by purchasing property and securing a loan for construction of a development on that property. The key concern in Northville was that an ordinance should not be voided for procedural irregularities when there had been a delay in the challenge to the ordinance and during that delay parties acted to their detriment in reliance on the public records. The court found that, under those circumstances, it would be inequitable to disturb settled real estate transactions based upon a procedural defect in the ordinance. Id at 435.

Based on the public policy exception articulated in Northville, the Court of Appeals in Viking's case declined to support Viking's challenge of the ordinance on procedural grounds. Ct. Appeals Op. at 4 (Appl. Leave to Appeal, Addendum 1). However, the Court of Appeals lost sight of the basis for its opinion in Northville and, instead, has created a mechanical exception

under the banner of "public policy" which it indiscriminately applied to Viking despite lack of evidence that any party detrimentally relied on the invalidly enacted Ordinance 96-2.[3]

Unlike the Northville situation, Viking has not relied on Ordinance 96-2. Nor was there evidence that anyone else has relied upon it. In addition, there is ample, uncontroverted evidence of procedural flaws in the adoption process for Ordinance 96-2, flaws that Viking brought to the Village's attention during the ordinance adoption process. Northville plainly does not stand for the proposition that Viking is precluded from challenging Ordinance 96-2 where it can demonstrate procedural defects in the ordinance and none of the elements of estoppel is present.

In a very recent case involving this specific issue, this Court reversed and remanded a decision of the Court of Appeals in which that court misapplied Northville. In Castle Investment Co v City of Detroit, unpublished per curiam opinion of the Court of Appeals, No. 22441 (March 19, 2002) (2002 WL 433164 (Mich App)), rev'd and remanded, 471 Mich 904; 688 NW2d 77 (2004) (Addendum 1), the Court of Appeals affirmed the trial court's dismissal of a complaint challenging Detroit's building ordinance on procedural grounds. The Court of Appeals reasoned that because the ordinance "had been in effect and relied upon by defendant for 22 years" that "public policy" mandated dismissal of the Plaintiffs' claim. Id at *3-*4. The Court of Appeals properly held that (i) the application of the laches doctrine to estop a procedural challenge to an ordinance requires evidence of both a delayed challenge to the ordinance *and* a change in position in reliance on the ordinance, and (ii) that delay alone will not justify the application of

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[3] In addition to relying on the Northville case, the Village argues that the Court of Appeals' decision in Tittle v City of Ann Arbor, opinion per curiam of the Court of Appeals, No. 229020 (Sept. 20, 2002) (2002 WL 31104093 (Mich App)) (Response in Opposition, Ex. 7), is dispositive. As an unpublished Court of Appeals case, Tittle is not precedent for this Court. In addition, unlike Tittle where officials and residents relied on and acted in accordance with an invalidly adopted ordinance, there is no evidence of such reliance in the Viking case. Therefore, Tittle is irrelevant.

the laches doctrine. Id at *2-*4. The Court of Appeals erred, however, by finding that the City had established both delay and prejudice as a matter of law. Consequently, this Court reversed the Court of Appeals in Castle Investment Co v City of Detroit, 471 Mich 904; 688 NW2d 77 (2004), and remanded the case. This Court specifically rejected the Court of Appeals' analysis that the City had met its burden of proving that "the delay in bringing the action resulted in the kind of prejudice that would support a laches defense." Id at 905.

Similarly, in Viking's case, the Court of Appeals also erroneously applied the doctrine to estop Viking from challenging Ordinance 96-2 on procedural grounds.[4] There is no evidence in Viking's case of either delay or prejudice. This Court made it very clear in Castle that the City had to establish the element of prejudice to fend off the Plaintiff's claim that the ordinance was invalid. Here, the Village made no allegations that any parties relied upon Ordinance 96-2 or that any real estate transactions were undertaken in reliance on the ordinance. Absent such proof of prejudice or detrimental reliance, the Court of Appeals clearly erred when it based its decision to deny Viking's affirmative defense to application of the flawed ordinance on public policy grounds.

One final case to consider is this Court's decision in Schaefer v City of East Detroit, 360 Mich 536; 104 NW2d 390 (1960). In Schaefer, this Court permitted a challenge to a zoning ordinance 22 years after the initial adoption of the ordinance. The Court prohibited a City from raising the defense of laches, which embodies the factors of delay and prejudice, where property

[4] It is important to emphasize that in the case at bar Viking did not bring an action challenging the zoning ordinance. Viking raised the procedural irregularities as an affirmative defense against the Village's application of Ordinance 96-2 to Viking. Once Viking established that the ordinance had not been validly enacted, the burden shifted to the Village to prove that Viking unreasonably delayed raising its affirmative defense and that the Village was prejudiced by the delay by acting to its detriment in reliance on the flawed ordinance. Castle, 471 Mich at 905.

owners affected by a zoning ordinance challenged that ordinance after it had been in effect for years and neither the City nor others were prejudiced by the owners' delayed challenge. 360 Mich at 541; 104 NW2d at 392.

The same situation exists in Viking's case. Viking's counsel sent letters to the Village Council or the Village attorney identifying defects in the ordinance adoption process as they arose. (Appl. Leave to Appeal, Addenda 23, 28 & 29). It was not until July 2000, when MDEQ issued Viking's new permit to burn a different mix of fuels, that Viking ran up against Ordinance 96-2. It was at this point that Viking's interest in burning fuels, as approved under the new state permit, was first adversely affected. The Circuit Court stated it clearly: "Prior to the time the new permit was granted, a significant part of Ordinance [sic] was not applicable to Viking, as the facility was still operating under the terms of the January 1997 permit. Thus, this Court cannot find that public policy and time bars Viking from challenging the Ordinance in the present suit."[5] Cir. Ct. Op. at 16 (Appl. Leave to Appeal, Addendum 25).

In sum, given the facts of this case, neither public policy nor the passage of time bars Viking's challenge of Ordinance 96-2. The Court of Appeals' decision concerning the validity of Ordinance 96-2 based on procedural flaws is directly in conflict with this Court's decisions in Castle and Schaeffer and must be reversed.

IV. RELIEF REQUESTED

The Village of Lincoln's Ordinance 96-2 is invalid in its entirety for procedural reasons. For the reasons set forth above, Viking respectfully requests that this Court:

A. Grant Viking's Application for Leave to Appeal;

[5] Nevertheless, the Circuit Court did not address the merits of Viking's claims.

B. Upon leave granted, reverse that portion of the decision of the Court of Appeals on the issue of the procedural validity of Ordinance 96-2 based on flaws in the adoption process for the ordinance;

C. Enter an Order stating that Ordinance 96-2 is invalid in its entirety; and

D. Enter such other relief in favor of Viking as this Court deems equitable and appropriate under the circumstances.

Respectfully submitted,

Dated: Nov. 23, 2004

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